Petition

81-1080

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In the Matter of the Application of
GODFREY C. BLOCH,

Plaintiff-Appellant,

-against-

THE VETERAN CORPS OF ARTILLERY,
STATE OF NEW YORK, CONSTITUTING
THE MILITARY SOCIETY OF THE WAR
OF 1812,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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28)

THE QUESTION PRESENTED

Was the order of the Court of Appeals of the State of New York wrong that dismissed the petitioner's application for appeal to that Court on the basis of no substantial constitutional question. The evidence appears to be that petitioner's rights of freedom of speech under the First Amendment to The United States Constitution were violated.

TABLE OF CONTENTS

	Page
The Question Presented.....	i
Table of Authorities.....	ii
Opinions Below.....	1
Jurisdiction.....	2
Statement of Case.....	2
Reasons for Granting Writ....	7
APPENDIX	
Order in Court Below.....	a1
Memorandum Decision.....	a4
Order of Appellate Division dated July 2, 1981.....	a14
Decision, Court of Appeals, September 10, 1981.....	a16

TABLE OF AUTHORITIES

Case	Page
Kinsey v. Macur, 165 Cal. Rep. TR 608.....	10
North Shore Right to Life Committee v. Manhasset American Legion Post 304, et ano, 452 F.Supp. 834.....	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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In the Matter of the Application of GODFREY C. BLOCH,
Plaintiff-Appellant,

-against-

INDEX # 3592/1975

THE VETERAN CORPS OF ARTILLERY, STATE OF NEW YORK, CONSTITUTING THE MILITARY SOCIETY OF THE WAR OF 1812.
Defendant-Respondent.

ORDER

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Petitioner prays that a writ of Certiorari, be issued to the New York State Court of Appeals to review petitioner's claim that his constitutional right of free speech was denied.

OPINIONS BELOW

There was no officially reported opinion in the Trial Court, The Supreme Court of the State of New York, County of New York. The Appellate Division of the Supreme Court, First Department wrote no opinion on the appeal from the

appealed order from The Supreme Court, County of New York. The Court of Appeals of the State of New York produced no opinion on the appeal from the Appellate Division except a one line dismissal order. The opinion of the lower Court and the Appellate Division and Court of Appeals dismissal orders are reproduced respectively in the attached Appendix.

JURISDICTION

Jurisdiction of this Court is conferred under 28 U.S.C. §1257(3). The Order of the New York State Court of Appeals was entered on September 10, 1981.

STATEMENT OF CASE

The defendant Veteran Corps of Artillery, State of New York, constituting the Military Society of the War of 1812, is a private military society which occupies space in a State owned

and operated Military Facility - The Seventh Regiment Armory. Plaintiff was charged with conduct unbecoming an officer (2nd Lieutenant) and a gentleman and willful disobedience of a directive of the Commandant (of the defendant) not to communicate with outside agencies on the Military Society matters. As a result of these charges, the plaintiff had a "court-martial" hearing before a uniformed board of officers of the defendant on July 23, 1975. The verdict of the board of officers was "guilty as charged". The plaintiff sued for reinstatement as a member with former rank restored and for a permanent injunction against defendant from taking similar actions against plaintiff in the future. The case was placed on the trial calendar and eventually came up for trial before Justice Louis Grossman of The Supreme Court of

the State of New York. Justice Grossman suggested that a motion for summary judgment be made by defendant. Defendant complied and made the motion on March 11, 1977. Plaintiff vigorously opposed the motion and raised what plaintiff considered many questions of fact and law precluding the granting of summary judgment, including the violation of his right of free speech. Justice Grossman issued summary judgment on May 3, 1977.

Basically, the plaintiff claimed he was tried at the defendant's hearing upon trumped up charges that were vague and indefinite and that an analysis of the almost all hearsay evidence reveals not only a very unfair hearing, but violations of the organization's own Rules and Regulations, violations of the laws of the State of New York, and a violation of the plaintiff's fundamental

constitutional rights of free speech. All these points were covered in great detail in the plaintiff's briefs and papers but were patently ignored by all the Courts.

Mr. Bloch was expelled from membership from the defendant because he protested the defendant allowing the units of the 77th Army Reserve Unit, a Federal Agency, using space at The Seventh Regiment Armory that belonged to the defendant. After bringing this confirmation of illegality on the part of the defendant to the defendant member's attention, and outside authorities such as Congressmen and the Governor of the State of New York, plaintiff was expelled. The Appellate Division reversed Justice Grossman's Order of dismissal.

From the point of reversal a trial was ordered by the Appellate Division of The Supreme Court which took place

before Justice Irving Kirschenbaum. The trial found that procedure used by defendant was faulty and ordered a second hearing before a Board of Officers of respondent which was held on March 25, 1980.

Justice Kirschenbaum then ordered a third hearing after throwing out the results of the second hearing. The plaintiff requested that Justice Kirschenbaum issue an injunction against any further interference with plaintiff's rights of membership and an immediate restoration of all rights and privileges of membership with a status quo restoration of plaintiff into defendant. This the Court below refused to do. The Appellate Division dismissed the case on appeal. The subsequent appeal to the Court of Appeals of the State of New York was also dismissed.

REASONS FOR GRANTING WRIT

As stated throughout the trials and appeals, petitioner asked that he be restored to membership on the basis that his right of free speech had been interfered with in that The Seventh Regiment Armory where the respondent met is a State facility of the State of New York and the respondent held its meetings in this facility. The result is when the respondent accused petitioner of communicating with outside parties as the basis for expulsion of the petitioner, it violated petitioner's right of free speech. Since the respondent operated under State auspices this was a violation of the First Amendment of The United States Constitution.

I believe the Court should examine the case of North Shore Right to Life Committee v. Manhasset American Legion Post 304, et ano. 452 F. Supp. 834.

This case is almost on all fours with the instant case in that the Court found that the plaintiff's right of free speech and assembly had been violated in that The American Legion, a private military organization refused to allow the plaintiff to march in its parade on Memorial Day. The Court said that even though The American Legion was a private organization, it informally did the work of the State, by regulating who it allowed to march in its parade. The reason for not allowing the plaintiff to march was because its point of view was controversial. The answer the Court gave was that this was a denial of freedom of expression. Since the Court found that The American Legion was doing the work of the Town of North Hempstead on whose streets the parade would take place, it was acting as an agent of the State. This was an

impermissible interference with Constitutional rights.

In our case, the State of New York allows a private military organization to use a State owned and operated facility, namely The Seventh Regiment Armory. When this private organization forbade the petitioner talking with outside parties about a patently illegal use by a Federal Agency, The 77th Army Reserve Unit, of the space that was assigned by the State of New York to the respondent, Veteran Corps of Artillery. In effect, respondent was acting as an agent of the State of New York. Therefore a suppression of petitioner's right of free expression, his right to communicate with outside parties was suppressed. This is a violation of the First Amendment of The United States Constitution.

The Court should also examine the

case of Kinsey v. Macur 165 Cal. Rep TR 608 for the proposition that one's right of free expression under The United States Constitution is protected in any case where one communicates with outside parties when that communication is of public interest. In our case, the matter was certainly of public interest that the petitioner was bringing to the attention of public authorities that The Seventh Regiment Armory was being illegally used by a Federal Agency.

Respectfully submitted,

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APPENDIX

APPENDIX

ORDER IN COURT BELOW

At a Trial Term, Part II, of the Supreme Court of the State of New York, County of New York, at the Court House at 60 Centre Street, New York, New York, on the 3rd day of February, 1981.

PRESENT:
IRVING KIRSCHENBAUM,
Justice

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In the Matter of the Application of GODFREY C. BLOCH,
Plaintiff-Appellant,

INDEX # 3592/1975

-against-

ORDER

THE VETERAN CORPS OF ARTILLERY, STATE OF NEW YORK, CONSTITUTING THE MILITARY SOCIETY OF THE WAR OF 1812,
Defendant-Respondent.

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Upon plaintiff's notices of motion, dated May 2, 1980 and May 20, 1980 for an order reinstating the plaintiff to all the rights and privileges of membership in the defendant and for a permanent injunction against the defendant from

proceeding against the plaintiff to expel, suspend or in any way tamper with the plaintiff's membership in the defendant organization, and the affirmations of Michael C. Devine, Esq., dated May 13, 1980 and June 12, 1980 and the affidavit of James W. Gerard, II in opposition to the motions, and the affirmations of Wallace M. Germain, Esq. in support of the motions, dated April 30, 1980, May 20, 1980 and June 16, 1980, and the court having rendered a decision, dated January 5, 1981 on the motions, it is ordered that:

The motions are granted to the extent that a third hearing is ordered before a Veteran Corps of Artillery board formulated in accordance with this court's decisions dated December 5, 1979, and January 5, 1981.

It is further ordered that Commandant James W. Gerard and Vice-Commandant

Malcolm G. Smith shall not serve on this board.

It is further ordered that Commandant James W. Gerard shall pursuant to statutory guidelines appoint replacements for himself and Malcolm G. Smith on the board.

It is further ordered that the hearing be held within thirty days after service of a copy of this order with notice of entry.

ENTER:

IK

JUSTICE SUPREME COURT

MEMORANDUM DECISION

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 2

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In the Matter of the Application:
of GODFREY C. BLOCH,

:

Petitioner,

:

-against- INDEX

: No.

THE VETERAN CORPS OF ARTILLERY, 3592/75
STATE OF NEW YORK, CONSTITUTING :
THE MILITARY SOCIETY OF THE WAR
OF 1812, :

Respondent. :

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KIRSCHENBAUM, J.

This is a motion by the plaintiff Godfrey C. Bloch pursuant to CPLR 3017(a) for an order "reinstating the plaintiff to all rights and privileges of membership in the defendant and for a permanent injunction against the plaintiff to expel, suspend or in any way tamper with the plaintiff's membership in the defendant organization."

CPLR 3017(a) specifies that pleadings contain a demand for relief and provides that the court may grant any type of relief within its jurisdiction appropriate to the proof, whether or not demanded. Although CPLR 3017(a) does not directly provide for the relief sought by this motion, that procedural problem can be resolved under CPLR 103(c), which provides: "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

The branch of the motion for a permanent injunction is denied. Such an injunction would have the effect of making Bloch a permanent member of the Veterans Corps of Artillery ("VCA"), immune from the application of the rules

and regulations of the VCA regarding membership. There is no basis presented here for exempting Bloch in perpetuity from the membership requirements that are applicable to all VCA members.

To resolve the question of whether Bloch is to be reinstated to full VCA membership, the court will review the relevant procedural history of this action. Initially, Bloch sought review by this court of the determination of the VCA, made after a hearing held before a VCA Board of Officers, that he be dismissed from membership upon charges of "conduct unbecoming an officer and gentleman" and "willful disobedience of orders."

Special Term granted VCA's motion for summary judgment and dismissed the complaint. The Appellate Division reversed and held that a trial was necessary to determine whether the Board

of Officers was properly constituted, whether a quorum was present and whether the hearing was fair and impartial, Bloch v. Veterans Corps of Artillery, 61 A.D.2d 772.

After a trial before the court without a jury, the court found that there was considerable doubt that a quorum was present and directed a new hearing to insure fairness and impartiality. It was specifically ordered that the new hearing take place before a Board composed of members who have not been members of the U.S. Army Reserve during their terms of membership in the VCA.

On March 25, 1980, the new hearing was held before a Board of Officers formulated in accordance with the court's directive. Counsel for Bloch challenged the panel on two grounds. First, it was alleged that certain officers of the VCA

who were required by VCA regulation to be Board members were not on the panel. The VCA responds that substitutions had to be made to comply with the Court's order that U.S. Army Reserve members be excluded from the Board. Thus the irregularity cited by Bloch arose from the need to constitute an impartial Board, and cannot serve as a ground for disqualifying those substituted VCA officers.

The second challenge concerns the impartiality of two Board members, James W. Gerard, II and Malcolm G. Smith. They sat on the original Board that unanimously expelled Bloch from the VCA in 1975, and have been sued by Bloch in a lawsuit for damages allegedly caused by the expulsion. Bloch's counsel addressed questions to Gerard and Smith concerning their impartiality, but they refused to respond to those inquiries.

The hearing then proceeded with the questioning of witnesses. Major Robert Coe, the complainant, testified for the VCA and was cross-examined. Victor Braida, a former VCA member, testified for Bloch. The VCA called Bloch as a witness, but he refused to testify, without stating a reason for his refusal. Bloch's attorney then presented a summation urging that the charges be dismissed.

The Board found that the charges against Bloch had been sustained and expelled him from the VCA. On May 12, 1980, that finding was approved by VCA's Council of Administration.

The decision of the Appellate Division in this case contains the following language:

> "It is well established that where the constitution and by laws of a voluntary association reasonably set forth grounds for expulsion and provide for a hearing upon notice to the member, judicial review of such proceedings is unavail-

> able, unless the reason for expulsion is not a violation of the constitution or by-laws or is so trivial as to suggest that the action of the association was capricious or corrupt, or unless the association failed to administer its own rules fairly." (citations omitted)
>
> "Although rules of evidence are not applicable, it is fundamental that the trial held before the voluntary association tribunal be fair and impartial."
>
> "It is manifest that the accused are not likely to be impartial judges of their accuser. (Wilcox v. Supreme Council of Royal Arcanum, 210 N.Y. 370."

It is not the function of this court to reinstate the plaintiff to all rights and privileges of membership in the VCA. The determination of his eligibility for membership is solely the province of the VCA, provided it administers its own rules fairly and provides a fair and impartial hearing. Therefore, the branch of the motion seeking reinstatement is denied.

The question of the proper composition of the Board can be resolved by reference to specific statutory provisions. Section 1 of Chapter 513 of the laws of 1913 and Section 8 of Chapter 328 of the laws of 1904 specify that the following eight officers shall constitute a board of examination: Commandant, Vice-Commandant, Adjutant, Quartermaster, Chaplain, Paymaster, Commissary and Surgeon. Those officers shall be

> "a board of examination with the powers thereof, and have authority to hear and determine any charge against any member of said organization for nonpayment of dues or fines or for conduct unbecoming a member thereof, or for any offense whatsoever in so far as the same may be prejudicial to good order and the efficiency of said organization and may, after an opportunity given such member to be heard relative thereto, but not otherwise, by a majority vote, fine, suspend or dismiss such member from said corps and society. Five members of said board shall be a quorum for any business." (sec. 8, Chap. 328, L. 1904)

Under section 1 of Chapter 513 of the laws of 1913, the Commandant "may when there shall be a vacancy on said board from any cause assign another officer to the same until the business is concluded."

Accordingly, any vacancy on the Board caused by the disqualification by this court of VCA members who have been members of the U.S. Army Reserve must be filled by the Commandant. On this motion the court will also disqualify Commandant James W. Gerard and Vice-Commandant Malcolm G. Smith from hearing the charges against Bloch. The fact that they are the defendants in Bloch's civil action for substantial damages raises a serious question as to their impartiality in this matter. (See Wilcox, supra, cited by the Appellate Division herein) However, consistent with the statutory guidelines cited supra, the Commandant, and not this

court, is empowered to designate replacements for himself and for Malcolm G. Smith for the purpose of empanelling a proper board to consider the charges against Bloch.

Accordingly, this motion is granted only to the extent of directing a third hearing before a VCA board formulated in accordance with this court's decision dated December 5, 1979, with the applicable statutory provision and with this decision.

Settle order.

Dated: January 5, 1981

_____

J.S.C.

IRVING KIRSCHENBAUM

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 2, 1981

Present-Hon. Harold Birns, Justice Presiding
Leonard H. Sandler
David Ross
Arnold L. Fein, Justices.

In the Matter of the Application of Godfrey C. Bloch,
Plaintiff-Appellant,

-against- 11390

The Veteran Corps of Artillery, State of New York, Constituting the Military Society of the War of 1812,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Kirschenbaum, J.), entered on February 3, 1981 which, granted plaintiff's motion for reinstatement of membership in defendant organization only to the extent of annulling the hearing and

ordering a new hearing, and said appeal having been argued by Mr. Wallace M. Germain of counsel for the appellant, and by Mr. Michael C. Devine of counsel for the respondent; and due deliberation having been had thereon.

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

ALAN M. BERGER
DEPUTY
Clerk.

1 Mo. No. 908

In the Matter of the Application
of Godfrey C. Bloch,
Appellant,
vs.
The Veterans Corps of Artillery,
State of New York, Constituting
the Military Society of the War
of 1812, Respondent.

Motion to dismiss the appeal granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

DECISION COURT OF APPEALS SEP 10 1981

Opposition

81-1080

No. _____

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IN THE

Supreme Court of the United States

October Term, 1981

In the Matter of the Application
of GODFREY C. BLOCH,

Plaintiff-Appellant,

-against-

THE VETERAN CORPS OF ARTILLERY,
STATE OF NEW YORK, CONSTITUTING
THE MILITARY SOCIETY OF THE WAR
OF 1812,

Defendant-Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of
the State of New York

DEFENDANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(18884)

QUESTIONS PRESENTED

1. Whereas in this action the state court has not decided any federal question, of substance or otherwise, are there "special and important reasons" (within the meaning of Supreme Court Rule 19(1)(a)) to grant a writ of certiorari?

2. Is there a "final judgment or decree rendered by" the New York Court of Appeals, and if so, is there "specially set up or claimed" any right or privilege under the United States Constitution sufficient to support jurisdiction in this Court pursuant to 28 U.S.C. § 1257(3)?

3. By agreeing in the Appellate Division of the New York State Supreme Court to "accept" final expulsion from Veteran Corps membership if the trial court decision was affirmed (as it

was) did plaintiff waive any right which he may have had to seek a writ of certiorari?

INDEX

Questions Presented i

Table of Authorities iv

Statement of the Case 2

Conclusion 8

TABLE OF AUTHORITIES

Statutes

Supreme Court Rule 19 2

28 U.S.C. §1257 4

N.Y.C.P.L.R. §5602. 5

Cases

Kinsey v. Macur, 107 Cal. App. 3d 265 (1st Dist. 1980) 8

McMaster v. Gould, 276 U.S. 284 (1928). 5

North Shore Right to Life Comm. v. Manhasset Amer. Legion Post 304, 452 F. Supp. 834 (E.D.N.Y. 1978). . 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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In the Matter of the Application of GODFREY C. BLOCH,

Plaintiff-Appellant,

-against-

THE VETERAN CORPS OF ARTILLERY, STATE OF NEW YORK, CONSTITUTING THE MILITARY SOCIETY OF THE WAR OF 1812,

Defendant-Respondent.

----------x

DEFENDANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendant-respondent, Veteran Corps of Artillery of the State of New York ("Veteran Corps"), opposes plaintiff-appellant's petition for a writ of certiorari to the Court of Appeals of the State of New York.

STATEMENT OF THE CASE

In this action no New York State court ever has considered or decided any federal question, and certainly not a "federal question of substance" as that phrase is used in Rule 19 of the rules of this Court. The only issue raised or decided in the state courts is the proper composition of the board of officers which heard the charges against plaintiff. Plaintiff asserted that specified members of the board should be disqualified because of a possibility of bias. The trial court agreed as to certain members and disagreed as

to others, ordering such rehearings as it deemed appropriate to insure a fair and impartial determination. There was no federal question, as readily can be seen from Judge Kirschenbaum's decision (p. a-4 of the petition), particularly at page a-7 et seq. where the judge recapitulates the two arguments made by plaintiff, both of which deal solely with the proper composition of the board of officers. The trial court proceeded to dispose of both issues on the basis of New York state case law regarding the procedures which must be followed by private organizations in disciplining their members. No federal law was urged by plaintiff, considered by the court, or applied in the decision.

At no point did plaintiff ever set up or claim a federal right or privilege, and certainly did not set up

any such right or privilege "specially", as required by 28 U.S.C. §1257(3). Here the word "specially" certainly means "expressly" or "formally". In his petition plaintiff has not submitted to this Court a copy of his brief in the New York Appellate Division. On page 1 of that brief he enumerates the "questions presented" as follows:

> "1. Based upon the hearing that was had by the defendant of the plaintiff as to whether to expel him or not, were the charges sustained allowing expulsion?"
>
> "2. Did the defendant violate its own rules on expulsion of the plaintiff?"

Plaintiff did not raise any other question in the Appellate

Division, and neither of these questions sets up "specially" any federal constitutional right or privilege.

Nor has there been a "final judgment or decree in the highest court in the state in which a decision could be had". Plaintiff's effort to appeal as of right to the Court of Appeals was dismissed, but he never sought to appeal by permission (N.Y.C.P.L.R. § 5602(a)(1)(i)). See McMaster v. Gould, 276 U.S. 284 (1928).

Additionally, in the New York Appellate Division plaintiff expressly waived any right which he may have had to seek permission for further appeals. A conference before Hon. Theodore R. Kupferman resulted in a written stipulation, signed by counsel for both parties, and "so ordered" by Justice Kupferman, which in relevant part states:

> "... if the appeal to this Court from the order of Hon. Irving Kirschenbaum dated February 3, 1981, is affirmed plaintiff will accept the result of the hearing held before the Board of Officers of defendant on March 25, 1980, and will thereby be effectively and finally expelled from membership in defendant organization."

Finally, plaintiff's petition to this Court is factually inaccurate. At page 5 he states that he was expelled from membership because he protested the defendant allowing army reserve units to use defendant's space at the armory. This charge was not made against plaintiff. His expulsion was due primarily to his use of offensive language in telephone calls to a U.S. Army officer not associated with

defendant and to the elderly mother of one of defendant's members, as well as plaintiff's unauthorized interception, and subsequent disclosure, of mail directed to defendant's commandant.

Nor do the cases relied upon by plaintiff establish the existence of a substantial federal question. In North Shore Right to Life Comm. v. Manhasset Amer. Legion Post 304, 452 F. Supp. 834 (E.D.N.Y. 1978)a"free speech" issue was raised directly in the U.S. district court under the federal civil rights statute, whereas in the present case there is no "free speech" issue (certainly there is no federal right to insult and defame others, as plaintiff is charged with doing), there is no state action (defendant is a private organization), and there is no federal civil rights claim commenced in a U.S. district court. Similarly,

plaintiff's reliance upon Kinsey v. Macur, 107 Cal. App. 3d 265 (1st Dist. 1980) is misplaced. There the court rejected defendant's assertion of a right to invade plaintiff's privacy by verbal assaults and disclosure of personal facts. If anything, the Kinsey case supports Veteran Corps' right to expel plaintiff for his verbal abuse of persons whose right of privacy had been invaded.

CONCLUSION

This is an ancient case. It began more than six years ago. Plaintiff has harassed and abused defendant with meritless appeals and applications long enough.

No substantial federal question has been raised or decided. Indeed plaintiff's own statement of the "question presented" (p. i of the petition) does not set up a constitutional

issue. It simply asks for review of the refusal of the New York Court of Appeals to accept an appeal from the New York Appellate Division. This Court does not review such procedural determinations by New York courts. The federal constitution does not require that New York afford any litigant two state appeals from a trial court judgment.

It respectfully is requested that the petition be denied.

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